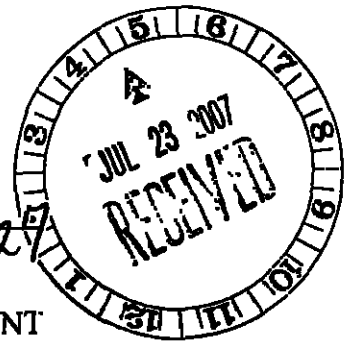

Before the
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB 865-X 219827

HONEY CREEK RAILROAD, INC.–ABANDONMENT
IN HENRY COUNTY, IN

and

DOCKET NO. FD 34869 219828

HONEY CREEK RAILROAD, INC.
PETITION FOR DECLARATORY ORDER

MEMORANDUM IN SUR-REPLY TO PETITION FOR DECLARATORY ORDER AND IN SUPPORT OF PETITION TO INTERVENE IN AB 865-X, TO CONSOLIDATE AB 865-X AND FD 34869, AND TO REOPEN AB 865-X AND RECONSIDER DECISIONS THEREIN

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Dated: July 23, 2007

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Before the
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB 865-X

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INTRODUCTION

This is a dispute between two Indiana individuals over the nature of five miles of track in a single Indiana county. Mr. Smith owns all of the stock in a corporate entity called Honey Creek Railroad ("HCR"), which in turn owned the five miles of track in question and the Rushville line in Rush County. HCR has no employees, rail cars, tariffs, stations, loading platforms, or agents. Its single customer, Morristown Grain, staffs and runs the operations on the tracks and provides funds to HCR on an as-needed basis Morristown Grain is also wholly owned by Mr. Smith. For each of the points argued by Roberts, the law sets forth a standard that requires a careful review of an array of facts and a determination based on the objective picture created by the totality of those facts. The law rejects reliance on self-proclaimed labels, isolated facts, or post hoc claims about

subjective intentions. But, HCR's Rebuttal Statement presents only those rejected analyses. In the process, it presents purported facts and arguments directly contrary to its discovery record.

Smith's actions do nothing to advance public policy related to the interstate rail system or conversion of former right of way to recreational trails. Instead, his actions are a bold attempt to use the regulations of this Board to subvert state law for his personal gain. If he succeeds, he will bring the system of railroad regulation into disrepute. For all of the reasons set forth below, the Board should find that it has no jurisdiction and/or a consummated abandonment has occurred and send this case back to state court where it belongs.

I. HCR has operated as a non-carrier.

A rail carrier is "a person providing common carrier railroad transportation for compensation." 49 U.S.C § 10102(5). In deciding whether this definition has been met, the courts apply an objective test that relies on what the carrier actually does rather than the label the carrier attaches to its activity. When it purchased the Sulphur Springs line, HCR was given permission to operate as a carrier, but it never did so. It operated the Sulphur Springs line in exactly the same way as it operated the Rushville line: as a captive tool for getting Morristown Grain's—and only Morristown Grain's—commodities to the interstate rail network. It was not a carrier in Rushville and it was not a carrier in Sulphur Springs As shown in Roberts' brief in reply to HCR's petition for declaratory judgment ("Roberts Reply Br.") (at 13-15), all of the factors courts use to determine carrier status support the conclusion that HCR was not a carrier.

HCR does not dispute the law as stated by Roberts in his reply brief. HCR does not deal with the myriad facts relied on by the courts, all of which point to non-carrier status. Instead, HCR contends that: (1) HCR was a carrier by virtue of an agency relationship with Conrail; (2) HCR "held out Sulphur Springs, Indiana, as a common carrier rail station"; and (3) HCR had customers in addition to Morristown Grain. All three contentions are false.

HCR was not Conrail's agent. Appendix H to the sale agreement--the freight operations agreement—states in its first numbered paragraph:

> 1. Relationship of the Parties. Nothing in this Appendix shall be deemed to constitute either Operator [HCR] or Conrail as the agent of the other for the handling of any traffic, the billing or collection of any charges, or the payment of any assessment.

(*See* App. H to Ex. E of Verified Rebuttal Statement of William E. Smith ("Smith Verified Statement")) [1]

Instead, HCR agreed to provide the switching service for the short section of track it purchased solely to service Morristown Grain HCR and Conrail had the same arrangement with respect to the Rushville elevator for which HCR was paid the same amount. (Smith Dep. at 59-60 at Ex. H to Declaration of Kathleen Clubb Kauffman ("Kauffman Decl.") attached to Roberts Reply Br., filed on June 18, 2007). HCR recognizes that it was not a carrier with respect to the service it provided at Rushville.[2]

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[1] Appendix H, and the other details of the Conrail sale, were not available in the STB file and were not produced by HCR until they were attached to Mr. Smith's Verified Statement.

[2] When HCR provides this switching service, it is not listed on the bill of lading and is not liable for any loss. It is in that sense, and only that sense, that it is an agent of the common carrier that issues the bills of lading, rather than a *participating* carrier. *Louisiana Southern Ry Co v Anderson, Clayton & Co*, 187 F.2d 908 (5th Cir. 1951) ("So far as the bills of lading are concerned, the switching carrier was only the agent of the line-haul carrier" so that it was error to

One does not become a common carrier by providing switching services to a common carrier. Thus, the provision of the switching service is evidence of nothing other than the fact that, if the track was not a spur, then it was a switching track and also not subject to the Board's jurisdiction on that independent ground. *Brotherhood of Locomotive Eng'rs v United States*, 101 F.3d 718 (D.C.Cir. 1996) (six mile track serving three shippers was a switching track under the governing "usc" test and thus not subject to STB jurisdiction).

Next, HCR's brief claims that "both NS and HCR held out Sulphur Springs, Indiana as a common carrier rail station in the Open and Prepay Station List Tariff OPSL 6000." In fact, both Rushville and Sulphur Springs are listed in this book.[3] (*See* Ex. 1 to Second Declaration of Kathleen Clubb Kauffman ("Kauffman Second Decl.")). Rushville is admittedly not operated as a common carrier station by HCR. Inclusion in the Station List does not make HCR a common carrier with respect to Rushville and the same is true of Sulphur Springs. Mr. Smith's Verified Rebuttal Statement says that Sulphur Springs was listed, he does not say how it happened to be listed, or if he was aware of the listing prior to being asked to sign his statement. Mr. Smith is clear that he never issued a tariff, so that was not the source of the listing (Smith Dep. 21 at Ex. H to

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enforce the obligations of the bill of lading against the switching carrier as if it was a participating carrier.)

[3] The *Official Railroad Station List* is a "rail station directory." The publisher compiles geographical information on stations, which it receives after solicitation from major railroad companies. Any participating railroads may change the content of their entry at will. (*See* Exhibit 2 to Kauffman Second Decl.) Further, as the book title indicates, it focuses on geographical information on stations and does not include the nature of railroad lines or the use of those lines. The book appears to include all types of stations, even those stations on abandoned lines. For example, the Milan Station in Ohio is listed on p. 343 of the 2004 edition of the book. (*See* Exhibit 3 to Kauffman Second Decl.). The entry shows that the Wheeling and Lake Erie Railway Company ("WE") owns the station. But the record at the STB shows that the WE already abandoned the line in 1996, about one decade ago. (*See* Exhibit 4 to Kauffman Second Decl.)

Kauffman Decl.). There is nothing in the record to show that Mr. Smith and HCR did anything to "hold out" Sulphur Springs or Rushville—both of which appear in the Station List.

To the contrary, Mr. Smith has never "held out" the existence of a station – common carrier or otherwise—at Sulphur Springs. He testified that he maintained ***no*** station at the Sulphur Springs Morristown Grain elevator or at any place else along the Sulphur Springs track.

> Q. Did it [the Sulphur Springs track] have any stations on it?
>
> A. Could you clarify what a station would be?
>
> Q Where others could hook up to it or you could obtain customers' cars or that sort of thing?
>
> A No.
>
> Q. No other connections or anything like that on the Sulfur [sic] Springs line?
>
> A. No.
>
> Q. Was there a loading platform at the elevator?
>
> A. No
>
> Q. How did the grain get into the cars then at the elevator?
>
> A. It was loaded through the elevator system, hopper cars.
>
> * * *
>
> Q. And there were no other places to load cars along that line down to where it hooked into Norfolk Southern, right?
>
> A. No, sir.

(*See* Smith Dep. 27 at Ex. H to Kauffman Decl.)

This testimony is consistent with HCR's interrogatory response to Interrogatory 11:

> 11. If since 1993, you have maintained, built or received revenue from any ... loading platform(s), agent(s), station(s) . on the HCR line, please identify each item:
>
> Answer: None

(*See* Ex. G to Kauffman Decl.)

Further, there were no customers shipping grain on the Sulphur Springs tracks other than Mr. Smith's wholly owned business: Morristown Grain. The claim that there were other shippers appears for the first time in HCR's Rebuttal Statement. (HCR Rebuttal Statement at 12). This claim is contrary to every representation in the case. Interrogatories 3 and 4 state:

> 3. Please identify by date and name all shipments on the HCR line by shippers other than entities owned or controlled by HCR, William E. Smith or any other officer of HCR
>
> Answer: None
>
> 4. Please identify by date and name of shipper the last time the HCR line was used for rail traffic.
>
> Answer: December 1999. Morristown Grain Company, Inc.

(*See* Ex. G to Kauffman Decl.).

Similarly, Morristown Grain was stated to be the sole shipper in response to document request 9

> 9. Please produce all documents discussing or referring to the names of all shippers who used the HCR line other than shippers owned or controlled by William E. Smith.
>
> Answer. The only shipper is Morristown Grain Company, Incorporated, and William E. Smith is the sole shareholder.

(*See* Ex. F to Kauffman Decl.).

In his deposition, Smith testified multiple times that HCR's only customer was Morristown Grain. (*See* Smith Dep. at 9, 17, 21, 103, Exhibit II to Kauffman Decl.) ("we don't have any shippers.") Mr. Smith candidly stated that "We just run it as a branch off the—off the Norfolk Western [sic] and hauled our own products down there. And that was the main reason for having the railroad." (Smith Dep. at 21 Ex. H to Kauffman Decl.).

Exhibit I to the Smith Rebuttal Statement is the document Smith represents to be a Norfolk Southern document entitled "Honey Creek Railroad Shortline Marketing Profile" from 2001. It states that the number of customers is "1" and under Customer Listing, that sole customer is Morristown Grain. On the bills of lading offered by Smith (Ex. J-1), HCR's name appears nowhere, but Morristown Grain's name does appear. Morristown Grain is listed as the "Shipper." Morristown Grain's customer is listed as the "Consignee." This evidence, and HCR's binding admissions in discovery, precludes the claim in the Rebuttal Statement that there were multiple shippers who were "customers" of HCR on the Sulphur Springs line.

This case is identical to *Bar Techs, Inc v Conemaugh & Black Lick R R.*, 73 F Supp. 2d 512, 515 (D Pa. 1999), where the court found that a company was a non-carrier because "it has no intention of operating its rail line as a common carrier for hire to shippers, but seeks only a means of transporting its own carloads of steel from" its own plant onto the interstate rail network. *See also Kelly v General Electric Co*, 110 F.Supp. 4 (D. Pa. 1953) (Despite the fact that defendant shipped its products F.O.B. plant, the court found that it was not a common carrier.).

II. HCR used the line as a spur or a switch track because it served only one shipper for the purposes of transferring the shipper's grain from the shipper's grain elevator to an interstate rail.

In his reply brief at 15-18, Roberts argued that HCR used the line as a spur and therefore the Board has no jurisdiction over HCR's petition for declaratory order Roberts explained that "[i]t is *well established* that the determination of whether a particular track segment is a 'railroad line' . . . or a 'spur, industrial, team, switching, or side' track . turns on the *intended use* of the track segment, not on the label or cost of the segment." *See Nicholson v I.C C.*, 711 F.2d 364, 367 (D.C Cir. 1983); *Brotherhood of Locomotive Eng'rs v. United States.* 101 F.3d 718, 721 (D.C. Cir. 1996).

In its opposition, HCR claims that although the tracks are used for Morristown Grain's switching purpose, it is not a spur because the line allows Morristown Grain, HCR's only shipper, to start the shipments of its grain. (HCR Rebuttal Statement at 13-16). It is always the case that spurs to commercial facilities exist so that the facility can send cars to a connection with an interstate line. More than that fact is needed to establish that tracks like Sulphur Springs are not a spur. In his brief in reply, Roberts showed all the facts that establish these tracks are a spur. In response, HCR offers the circular argument that the tracks must not be a spur because they constitute the entire line of HCR. Under this reasoning, now that Sulphur Springs is abandoned, the Rushville tracks would have to transmogrify into a common carrier line because these are the only tracks HCR has left. This argument does not hold water

First, none of the authorities HCR relies on supports this argument. HCR mainly employs three decisions of the Board to advance its position. But out of these three cases, one appears not to exist; one is completely misplaced; another is incomplete at most. The

one that counsel for Roberts cannot find after extensive search is "*Review Trenton Railroad Company—Petition for an Exemption from 49 U.S.C § 10901 to acquire an operator rail line in Wayne County, MI*, STB Finance Docket No C4040 (Service date May 15, 2003)" (HCR Rebuttal at 14) The closest case which Roberts's counsel have found is *Riverview Trenton Railroad Company--Petition for Exemption From 49 U S C 10901 To Acquire and Operate a Rail Line in Wayne County, MI*, STB Finance Docket No. 34040 (Serv. May 15, 2003) ("*Riverview Trenton*"). Assuming this case is what HCR intends to cite, HCR misrepresents the title and docket number of the case. Not only that, HCR fails to completely present the Board's rulings in *Riverview Trenton.* There, in finding that the line at issue was not a spur, the court reasoned that as the record sufficiently established, the railroad was a common carrier intending to serve all shippers. But to the contrary, the record here unequivocally shows the opposite, *i e* , HCR was not a common carrier but a non-carrier and it only served one shipper, which was owned by William Smith, who also owned HCR. Thus, assuming HCR intends to rely on *Riverview Trenton*, the case is completely distinguishable from the instant case.

Similarly, HCR selectively quotes the Board's rulings in *Effingham R R. Co – Petition for Declaratory Order*, 2 STB 606 (1997), STB Docket No. 41986 (Serv. Sept 18, 1998) *aff'd, United Transportation Union v S T B* , 183 F.3d 606 (7th Cir. 1999) ("*Effingham*"). Specifically, in reliance on *Effingham*, HCR argues that where a line constitutes the entire line of a new common carrier, the line is subject to the Board jurisdiction. (HCR Rebuttal Statement at 13). This is not what the Board stated in *Effingham.* There, the Board found that the line at issue was not a spur for several reasons, one of which was that the line constituted the entire line of a new common

carrier, the status of which, contrary to the instant case, was not in dispute. Other reasons, which HCR chose to leave out, referred to existence of shipping agreements with other shippers. But in the instant case, as discussed in Section I, *supra*, the Sulphur Springs line served only one shipper and HCR made no shipping agreement with any other shippers.

With two of the three cases presented by HCR having failed, the only legal basis left to support HCR's argument is *Seminole Gulf Railway, L P , Exemption to Acquire and Operate -- CSX Transportation, Inc* , STB Finance Docket No. 31155, 52 FR 45509 (Serv. Nov. 30, 1987). This case also fails to prove HCR's point. As shown at Exhibit 5 to Kauffman Second Decl., the Board made no reference to the effect that the ICC exercised jurisdiction "over 3.55 miles of 85 pound stub ended track with no stations, platforms, or buildings, no record of regularly scheduled service and only limited shipper use." (HCR Rebuttal Statement at 15). There, within a one-page decision, the Board merely stated that the railroad had filed a notice of exemption to acquire and operate a railroad line.

Second, consistent with HCR's failure to provide legal authorities for its position is HCR's silence over Roberts's representation of the governing law and his application of the law to the facts. As Roberts argued in his Reply Brief (at 16), in their determination of whether a line is a spur or switching track, courts look at many factors, including the amount of traffic over the line, whether the railroad maintained regularly scheduled service, the number of shippers, whether the railroad maintained any stations, loading platforms, buildings, or agents alongside the line, whether the line was stub-ended; and whether the line was constructed of light rail. *See United States v Idaho*, 298

U.S. 105; *New York Central R. Co v Chicago & Eastern Illinois R. Co*, 222 F 2d 828, 830 (7th Cir. 1955); *Rochelle R.R v City of Rochelle*, 1998 U.S. Dist. LEXIS 13043 (N.D. Ill. 1998).

As argued in Roberts Reply Brief (at 17-18), the evidence, including HCR's answer to Roberts's interrogatories, HCR's abandonment filings with the Board, and other similar documents, show that all of those factors point to the conclusion that the Sulphur Springs line is a spur. In front of the avalanche weight of evidence, HCR merely refutes it with the fact Sulphur Springs is listed in a book entitled *Official Railroad Station Listing*. It is not published by the STB and the publishers do not do the legal and factual analysis required by the courts to determine if tracks are a spur. This evidence carries no weight in terms of proving that the line at issue is not a spur. The book compiles all kinds of railroad stations, including abandoned ones (*see* note 2, *supra*), across the country. It does not describe the characteristics of a line, which a court often considers in determining whether the line is a spur. Thus, it cannot defeat the conclusion that the Sulphur Springs line is a spur.

III. The Board has no jurisdiction today because the rails were *de facto* abandoned prior to the petition for abandonment authority.

HCR admits that the Sulphur Springs spur would be *de facto* abandoned if it was severed from the interstate rail system in circumstances where HCR evidenced the objective intent to abandon the line. However, HCR contends that there was no objective intent to abandon the line until 2004 because of the pending insurance litigation. In the process of making the argument, HCR converts the objective intent standard into a *subjective* intent standard. It then contends that Mr. Smith did not have a [subjective] intent to abandon because he says he did not. HCR cannot change the standard from

objective to subjective intent. The facts in the record, when viewed in their totality, show the objective intent to abandon, and thus a *de facto* abandonment, long before the petition was filed with the Board.

Ignoring that the Board and the courts looks at the totality of the circumstances to determine objective intent, HCR looks at each fact in isolation and contends that that fact alone has been shown not to evidence objective intent to abandon in other cases with other facts. By examining each tree in isolation, it attempts to distract the Board from the forest. But it is the forest that counts (Roberts Reply Br. at 18-21). Here, it is not only that HCR has only a few miles of track in one county in Indiana making these few miles of tracks of slight importance, not only that HCR filed no tariffs or reports of any kind and so had no tariffs to cancel (Roberts Reply Br. at 4), not only that HCR has provided only a switching service to Conrail and Norfolk Southern and is specifically stated *not* to be an agent in its agreement with Conrail (Norfolk Southern's predecessor in interest) (App. H 1-2 to Ex. E of Smith Verified Statement) (neither party is "the agent of the other"), not only that HCR's sole customer was permanently closed by early 2000 (Roberts Reply Br. at 5), not only that Mr. Smith was the sole owner of both the sole customer and HCR and operated the two business as an undivided unit without regard for independent corporate structures (*id* at 3-4), not only that the connection to the interstate system was removed and Norfolk Southern did a "complete" track retirement *at HCR's request* in 2001 (*id.* at 5 n10; *see also* Interrogatories 8-9 (no connection to the interstate rail system existed in 2004 and none exists today)) ; not only that HCR removed the track from its state reports in 2001 (*id.* at 5), not only that half the track was removed by HCR in 2001 (*id*), not only that Smith told INDOT in 2002 he had abandoned the line (*id.* at 6),

not only that Smith agreed to remove additional track and signage in 2002 (*id* at 6-7), not only that Smith failed to file the required discontinuance of service application (Smith Verified Statement at 8), not only that Smith admitted that he delayed filing for abandonment authority after *he said* the line was abandoned in order to subvert the operation of state law with respect to adjoining landowners (*id.* at 7), not only that Smith left the right of way in total disrepair causing flooding to fields, not only that there is no trail issue in this case, BUT ALL OF THESE FACTORS TOGETHER, show under the totality of the facts that the objective intent was to abandon the tracks and the tracks were in fact *de facto* abandoned long before the petition was filed with the Board.

In his Verified Rebuttal Statement, Mr. Smith confirms most of these facts, but still maintains that it was not until 2004 that "it became apparent" that the litigation with the insurance carrier would not permit him to reopen the Morristown Grain facility in Sulphur Springs.

This statement is directly contradicted by Smith's deposition testimony. There he testified as follows:

> Q. Well, tell me about the decision then to file for abandonment. How did that take place? Do you understand the question?
>
> A. I understand the question. I'm trying to remember what took place.
>
> Q. I just wanted to know if you understood the question So how did that whole process start? What did you do? Who did you talk to, that sort of stuff?
>
> A. I can't remember any names or anything about it. I'll tell you, this isn't all I got to do in my everyday job description. I mean, this is the least of importance to me.
>
> Q. Why did you start the process for abandonment?

A. I don't remember. I don't have any idea why. I mean, I know there's a reason. But I don't know when I started it or if I started it or how I started it.

Q. Okay

A. Somebody told me I needed to or what, I don't know. I can't -- - that's old business to me.

Q. Do you know why you would have started it in 2004 rather than in late 1999 when the elevator collapsed?

A. I was probably busy cleaning up the elevator, I'd say

Q. All right. But that didn't take you four years or so, did it?

A. Well, the elevator's still up there too, and I haven't done anything with it. I mean, you know, like I say, that's – I've got more important things to do than just worry about that elevator sitting up there. It don't bother me any at all that it's sitting there.

(*See* Smith Dep. 80-81 at Ex. H of Kauffman Decl.). This testimony makes it clear why the courts look at *objective* evidence of intent rather than relying on post hoc statements about subjective intent.

Unlike the long list of objective facts showing intent to abandon, Smith's contention that he did not intend to abandon the line until 2004 goes to his *subjective intent*. Because statements of subjective intent are so easy to falsify, they are not part of the test of whether there has been a *de facto* abandonment. *See Becker v STB*, 132 F.3d 60, 62 (D.C. Cir 1997) (whether a railroad has abandoned a line, one must focus on the railroad **objective** intent) (emphasis added). Indeed, nothing in the record supports Smith's assertion. The docket sheet for the insurance litigation is attached as Ex. 6 to Kauffman Second Decl. The docket sheet shows that nothing of significance happened in 2004. It was not until 2006 that anything of significance occurred. In May of 2006, a pretrial conference was conducted During 2006, the insurance company moved for

partial summary judgment. In August 2006, Smith was successful in avoiding summary judgment on the amount of his lost profits that resulted from the total closing of the Morristown facility in April of 2000. Thereafter, the case was resolved by a stipulated dismissal in November 2006. Nothing in this record supports the claimed shift in abandonment intent in 2004. Attached as Exhibit 7 to Kauffman Second Decl. is the brief in support of the motion for partial summary judgment Attached as Exhibit 8 is the Court's order granting the motion in part and denying the motion in part.

One of the few factual disputes before the Board is whether the last shipment on the Sulphur Springs rails happened in 1996 or 1999. Unfortunately, because HCR claimed it had no responsive documents on this issue until after Mr. Smith's deposition was complete, the facts are ambiguous. The ambiguity should be interpreted against HCR because of its abuse of the discovery process. This Board has inherent power to do so. *Cf* Fed. Civ. Proc. R.37(c)(1). However, no matter how the Board resolves the issue, it is not central to the question of whether there was an objective intent to abandon causing a *de facto* abandonment long before the abandonment petition was filed in 2004

The Henry County depositions discussed in Roberts' first brief, unambiguously state that the rail crossings were paved over making them unusable for train traffic in 1996 (*See* Roberts Reply Br. at 4-5). After the Henry County depositions and after the Smith deposition, Smith produced bills of lading he says evidence shipments over the rails in 1999 These documents were clearly called for by Roberts' document requests and were not produced until it was too late to question Mr. Smith. (*See* Request 10 at Ex. F of Kauffman Decl.). The documents are ambiguous. They are all Norfolk Southern bills of lading. The "rail origin" is Muncie, Indiana on all but one from February 1999

Smith's counsel asserts that the explanation is the rate basing point. All that explanation proves is that the rail origin information on these Norfolk Southern forms cannot be used as conclusive evidence of the rail origin. Because of HCR's abuse of the discovery process detailed in Robert's earlier brief, this disputed evidence should be resolved in Roberts' favor. (Roberts Reply Br. at 9-10); *see also*, Fed. Civ. Proc. R. 37(c)(1) (a party that without a substantial justification fails to disclose information as required is not permitted to use the information as evidence.). However, the Board resolves the issue, the totality of facts in this case show the objective intent to abandon caused a *de facto* abandonment long prior to the filing of the petition for abandonment in 2004.

IV. Despite not having filed a separate notice of consummation, HCR has completed the abandonment and has provided the Board with notice filed in the public record.

In his reply brief (at 21-29), Roberts argued that even if HCR has not filed a separate notice of consummation, it has exercised the authorized abandonment authority and has notified the Board in a public document that it has done so. In this circumstance, the Board's jurisdiction terminates. It is well-established that once a carrier abandons a rail line, the line is no longer part of the national transportation system and the Board's jurisdiction terminates, although the Board is empowered to impose conditions on abandonment. *Preseault v. I C C*, 494 U.S. 1, 6 n.3 (1990); *Hayfield Northern R.R. Co, Inc v Chicago & North Western Transp Co.*, 467 U.S. 622, 633 (1984); *see also Fritsch v I.C C.*,59 F.3d 248, 253 (D.C. Cir. 1995): *Iowa Power, Inc – Construction Exemption - Counsel Bluffs, IA*, 8 I.C.C. 2d 858 (Dec 20, 1990). In other words, where the Board has placed no conditions on a railroad abandonment, the Board's decision to

authorize an abandonment will bring its jurisdiction to an end. *Lucas v Twp. of Bethel*, 319 F.3d 595, 602 (3d Cir 2003).

In recent rulemaking, the Board required the carrier inform it within a specified time that abandonment had been consummated. If notice was not provided within the time specified, the carrier would have to start the administrative process over if it wanted conclusive evidence that a line had been abandoned. Through this requirement, the Board will use consummation letters as conclusive evidence on the abandonment issue so as to reduce the number of litigations over the issue. Here, HCR has stated in a public filing to the Board that it has concluded abandonment. It has sought to delay the jurisdictional impact by not filing *another* piece of paper saying the same thing. This elevates form over substance in a way that should not be permitted.[4] HCR has exercised its authorized authority and the Board's jurisdiction terminates.

In response, HCR mainly raises two points: one is that in addition to filing the consummation letter, it has not concluded the abandonment proceedings; the other is that the final rule of the Board shows that it intended to make the filing of a consummation letter a requirement of abandonment. Neither of these arguments withstands scrutiny.

First, in its pleading with this Board, HCR publicly stated that it had concluded the abandonment. (*See* Ex. E to Kauffman Decl.). This statement was unequivocal. Now, HCR makes an inconsistent statement that "it has not fully exercised the Board's abandonment authority." (HCR Rebuttal at 24). HCR claims that it has not cancelled its

[4] As the only party to date in the abandonment proceeding, HCR has requested and been granted extensions of the deadline for filing a separate notice of consummation. The Board has granted the extensions so that it could consider the facts and the briefs now before it in this proceeding The fact that the extensions were granted without Roberts and without the record and arguments Roberts can now provide, says nothing about Roberts' ability to argue now, and the Board's ability to agree, that a *de jure* abandonment has occurred

participation in the Open and Prepay Station List tariff, OPSL 600, which contains the Sulphur Springs entry." (*Id.*) But no case law or statutes shows that any of those matters is essential or necessary to the exercise of abandonment authority. Certainly, there is no authority stating that in order for a railroad to fulfill its abandonment authority, it has to pull its entry from a commercial book. To the contrary, the book contains the listings of stations which have been abandoned more than one decade ago. (*See* note 2, *supra*).

Further, HCR argues that -- after more than three years -- it has not removed "all of its rails from the HCR right of way" and "could not have yet restored disturbed soil to original grade or reseeded disturbed areas with native flora as directed by the Board." (*Id.*). But HCR does not believe that the Board placed such conditions on the abandonment. At one time, Roberts, whose fields are flooding because of this road bed, raised the question of HCR's obligation to return the road bed to original grade. This is the relevant portion of the reply of HCR's counsel.

> I have spoken with Richard P. Wilson concerning your contentions that Honey Creek has some duty or obligation to remove the railroad bed and clean the property or would have some other unspecified duty relating to the possible abandonment of the railroad. Mr. Wilson has advised me that there is no such duty, and further, that in over thirty years of railroad law practice, he has never seen an order which would require any such action on the part of the railroad.

(*See* Ex. 9 to Kauffman Second Decl.)

Thus, HCR's claim that it has not exercised its abandonment authority is merely an excuse and squarely contradicts its statement to the Board and to Roberts in this

proceeding.[5] Given the fact that HCR appears to make whatever statements it deems expedient at the time, this Board should reject HCR's arguments.

Second, HCR's attack on Roberts' citation of the final rule regarding the requirement of a consummation letter carries no weight because the Board's statement that it would continue to look to other factors if a notice of consummation was not filed disappeared between the proposed rule and the final rule Contrary to HCR's claim in its reply brief (at 25), the Board did not change its position. It stated:

> "[N]otices [of consummation] that are filed would be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation. If no notice of consummation of abandonment has been filed, we would continue to look at the other facts and circumstances to determine if consummation of the abandonment had occurred."

61 F.R. 11174, 11178

Consistent with this proposal, the Board in the final rule, after repeating the proposed rule, did not reject its position expressed in the proposed rule, *i e* , "if no notice of consummation of abandonment had been filed, we would continue to look at the other facts and circumstances to determine if consummation of the abandonment had occurred." 1 S.T.B. 894, *8 (1996).

Thus, given the history of the enactment of the rule, the language of the proposed rule and the final rule, the as well as the lengthy history of case law that a railroad can abandon the line without filing a consummation notice, the Board should reject HCR's interpretation that a consummation notice is essential

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[5] As a tease, Smith states that three years after the initial deadline for consummating the abandonment, reopening the line for an ethanol plant is under "active consideration " HCR Rebuttal at 7, Smith Statement at 10 Putting aside the outrageousness of raising this possibility three years after the abandonment order, the Henry County ethanol ship has sailed and will not dock at Sulphur SpringS. *See* Ex. 10 to Kauffman Second Decl

V. Public Policy and Equity Support Roberts' Requested Relief.

HCR contends that Roberts has unclean hands because he believed the obviously abandoned rail bed that flooded his fields was what it appeared to be. As the facts and briefs submitted here show, Roberts had a solid basis both in fact and in law for his actions. Once litigation ensued, Roberts maintained the removed scrap rail. His counsel told HCR's counsel that the switch was where HCR had left it and could be removed despite the pending litigation. Settlement was actively pursued. Roberts's hands are very clean. The facts, the law, and equity all support his position here.

In contrast, HCR and Smith have played games to subvert state law (and now claim that subversion as a virtue), acted with indifference to their obligations to the Board, to INDOT, and to adjoining landowners. Once in litigation, they stonewalled discovery and then presented a version of the facts in their Rebuttal Brief that is squarely contradicted by what little discovery they did provide.

HCR argues that the Board has a public policy interest in protecting HCR and Smith. What public policy supports such actions? The five miles of track at issue are not important to the interstate rail system. The Rushville tracks carried three times the traffic as the Sulphur Springs track did and were operated on exactly the same terms. With respect to the Rushville tracks, the Board found that it was not important to national rail policy that the tracks be subject to its jurisdiction. (*See* Ex. A to Smith Verified Rebuttal Statement). HCR did nothing to enact the common carrier obligations it now looks to for protection. It maintained no stations, served no customers other than Mr. Smith's elevators, permitted the tracks to fall into disrepair, and did nothing to serve the needs of

the public in general. There is no labor policy to protect here because HCR has no employees.

HCR urges the Board to send a strong and clear message to adjoining landowners not to remove track. The consequence of track removal will be a state law issue. The issue before the Board is the issue referred by the state court with respect to the status of the abandonment. With respect, the Board should render a decision strictly limited to the very special facts before it that sends a strong message to railroads that they need to operate professionally and responsibly. The railroad flag in which Smith now wraps his himself was nowhere in sight when the Sulphur Spring tracks were in use. The Board has stated that: "it is well settled that we should not allow line owners to manipulate the abandonment process by invoking regulation only when it is convenient." *RLTD Railway Corp , Docket No. AB-457X* (October 30, 1997). The Board has discretion when it views the totality of the facts. Finding a lack of jurisdiction in cases such as this one where a railroad is manipulating the process will not result in the "unintended result" that "a railroad company could bypass the abandonment procedures of [the code] by physically severing its line from the interstate system." *RLTD Railway Corp v Surface Transportation Board*, 166 F.3d 808, 813 (6th Cir 1999). Nor will it result in adjacent landowners cannibalizing legitimately dormant tracks of legitimate carriers.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of July, 2007 served a copy of the **Memorandum in Sur-Reply to Petition For Declaratory Order and in Support of Petition to Intervene in AB 865-X, to Consolidate AB 865-X and FD 34869, and to Reopen AB 865-X and Reconsider Decisions Therein** upon the following via first class United States Mail, postage prepaid:

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